Third, exclusivity is designed to avoid the predatory activity of the dominant local cable franchisee. In any particular MDU, if head-to-head competition is forced through passage of a mandated access right, the cable franchisee can cross-subsidize such activity with revenues obtained from its franchise-wide single family subscriber base. Although uniform pricing laws and regulations are helpful in this area, sufficient "loopholes" exist such that cable franchisees can continue such cross-subsidization. Indeed, the protection provided by the uniform pricing provisions of the Communications Act has been limited by the 1996 Telecommunications Act, which now prohibits only "predatory" non-uniform bulk discounts. Moreover, such laws do not even apply in areas subject to effective competition even though the particular competitor targeted at a single MDU by a cable franchisee may not have sufficient marketwide penetration so as to withstand a price war. Nor do such laws preclude discriminatory pricing for services other than rate regulated services and associated installation and equipment costs. Thus, a mandated right of access will only hand dominant players an additional anticompetitive weapon.

Finally, the impracticalities of ensuring multiple provider access in all instances throughout the country cannot be denied. It stands to reason that property owners forced to relinquish whole portions of their property for repeated overbuilding by telecommunications providers have little incentive to be cooperative with such forced overbuilders. Because forced access precludes negotiation and compromise by eliminating any bargaining power that the property owner currently enjoys, numerous logistical disputes are likely to occur which will need to be resolved on either the administrative or judicial level, e.g., the extent of the easement condemned, the location of the easement, whether aerial or underground facilities can be required, the aesthetics of interior wiring installation, potential interference with other utility easements and damage to lines together with associated liability issues, damages caused by nonconformance with construction schedules for new MDUs, workmanship quality,

and the like. Essentially, mandatory access would authorize multiple providers to be as invasive and intrusive as they wished -- installing or advocating lines, dishes, receivers and the like wherever they wished, both exterior and interior to the buildings. Moreover, separate condemnation proceedings may very well be required for each taking in order to guarantee a property owner the right to challenge the public use validity of the taking and/or the precise amount of just compensation which must be paid. Such compensation must include the full loss of the income-producing capability of the property, e.g., the value of subscription revenue lost by property owners who themselves provide telecommunications services or the value of the loss of the ability to sell an easement for access by a third party.

C. ICTA Strongly Urges The Commission To Preempt State And Local Cable Mandatory Access Laws As Antithetical To Federal Policy

1. Preemption Of Discriminatory State And Local Access Laws Will Achieve Access Parity

Fifteen states and the District of Columbia have passed cable mandatory access statutes in some form.[24/] In other states, municipalities have enacted cable mandatory access ordinances along the same lines. There are also a growing number of municipalities with such ordinances. With few exceptions, each of these laws discriminates in favor of franchised cable operators and against all

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[24/] Connecticut (Conn. Gen. Stat. § 16-333a (1975)); Delaware, (Del. Ann. Tit. 26, § 613 (1989)) (only if utility easements also exist); Florida (Fla. Stat. Ann. § 1232 (West 1982)) (still on the books with respect to condominium properties, although identical statute applicable in rental context found unconstitutional); Illinois (65 ILCS 5/11-42-11.1 (1993); Kansas (Kan. Stat. Ann. § 58-2553(b) (1982)); Maine (Me. Rev. Stat. Ann. tit. 14, § 710-B (1987)); Massachusetts (Mass. Gen. L. Ch. 166A §22 (1995)); Minnesota (Minn. Stat. Ann. § 238.23 (West 1982)); Nevada (Nev. Rev. Stat. Ann. § 742 (Michie 1987)); New Jersey (N.J. Rev. Stat. § 48.5A-49 (1982)); New York (New York Exec. Law, § 39-19-10 (1986)); Pennsylvania (68 Pa. Cons. Stat. Ann. §§250.501-B et seq. (1993)); Rhode Island (R.I. Gen. Laws §39-19-10 (1993)); West Virginia (W.Va. Code §5-18A-3 et seq. (1995); Wisconsin (Wis. Stat. §66.805 (1994)); and District of Columbia (D.C. Code Ann. § 43-1844.1 (1981)).

other video service providers. These discriminatory laws force property owners of multiple dwelling units and/or associations to grant only franchised cable operators access to their private properties for the provision of cable services to residents, even in circumstances where these property owners and associations have arranged for and offer similar cable services to the residents using competitive technologies such as private cable, MMDS, 18 GHz, DBS or 28 GHz. ICTA believes that the Commission should preempt such discriminatory mandatory access laws because they unfairly advantage the franchised operator, discourage competition, provide no benefit to the public, and conflict with federal policy.

Such laws by their very nature prefer the cable services of the franchised operator, rather than seeking to ensure in a neutral fashion that tenants simply have the ability to obtain video programming services from some source. In areas where mandatory access laws exist, the marketplace for the delivery of multichannel video programming services is skewed in favor of the traditional franchised cable operator because the choice as to who the single supplier will be is seized from the landowner, as is the property on which the facilities of the cable franchisee are installed. Under such laws, while non-franchised operators are completely precluded from entering into exclusive contracts, franchise operators may enter into such contracts whenever they want.

Competition is also greatly impaired where discriminatory mandatory access laws exists. Such laws conflict with the reality that a competitive marketplace now exists for the delivery of multichannel video programming services, treating cable franchisees alone as if they were providing a natural monopoly, utility-type service.[25/]

[25/] If state and local legislatures were concerned that tenants of MDUs might receive video programming services inferior to those offered by the municipally-licensed operator, these bodies (continued...)

The government's involvement on behalf of a private enterprise, which is not a regulated public utility and which does not offer an essential service, results in such a competitive advantage over other private enterprises providing similar services but not so aided that wholly private investment in alternative video distribution technologies will be discouraged. Entry by private cable, MMDS or 18 GHz operators, for example, has been and will surely continue to be chilled as a result of the preferential treatment of those video service providers municipally-franchised. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, Report, 5 F.C.C. Rcd. 4962, 5036 (1990) ("FCC Report") ("After reviewing the record, we believe that discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services."). Most ICTA members do not willingly operate in mandatory access states and the overwhelming number of their subscribers reside elsewhere. Thus, mandatory access laws lead to a lessening of competition rather than an expansion of competition.

Property owners and associations have proven reluctant or unwilling to contract with alternative multichannel video programming distributors where forced access via condemnation is available to the cable franchisee. Property owners and associations simply will not suffer an overbuild of their properties even under circumstances where the cable franchisee's service and rates are less than optimal.

Courts also recognize the anticompetitive nature of discriminatory mandatory access laws.

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[25](...continued)
could have mandated instead that property owners and associations must provide services that meet a quantifiable standard. In such fashion, the property owner or association could provide such services or select a third party to do so as long as the specified standards were met. Tenants would then be assured of access to quality services without preference to a single private competitor and without a physical appropriation of property.

In overturning a local mandatory access ordinance as unconstitutional, the Michigan Supreme Court found the discriminatory nature of the ordinance served to decrease competition:

> While allowing the [cable franchisee] to initiate condemnation proceedings to secure cable access to any dwelling in [the city], no corollary rights are granted other cable systems. [The cable franchisee] will be guaranteed the ability to compete with private cable systems where it decides to compete, without an equivalent right of competition guaranteed to private systems.

City of Lansing, 502 N.W. 2d at 646; see also, Cable Holdings, 953 F. 2d at 607-08(commenting on anticompetitive "unequal regime" that would have been created had Congress legislated a discriminatory mandatory access law -- which it did not -- and finding "that it would be odd if Congress intended to sanction exclusive agreements when negotiated by franchised cable companies, while at the same time outlawing similar exclusive arrangements when negotiated by non-franchised cable companies").

Discriminatory access laws also do not benefit the public. In fact, the "public use" or "purpose" derived from further entrenching a local monopoly is nil. To force head-to-head "competition" only at those multifamily dwellings whose landlords or condominium boards or homeowner associations have chosen a different supplier while leaving the rest of the municipality subject to the *de facto* exclusive service of the cable franchisee hardly advances a public use. It wholly serves the private interest of the cable franchisee by guaranteeing it alone access to every single available cable subscriber. This Commission should preempt states and localities from substituting mandatory access laws for competitive marketplace forces.

Indeed, cable mandatory access statutes are not drafted so as to ensure that residents of MDUs actually have the right to receive cable television services. Such statutes do not grant tenants the right to force a cable franchisee to condemn property in order to ensure the tenants' receipt of cable services. While a tenant request is typically a prerequisite to forced entry, the cable franchisee has no obligation to honor the tenant request -- even if that tenant has no cable service available whatsoever.

The decision as to whether to serve any particular MDU is left to the unilateral business judgment of the franchised cable operator. If the condemnation is economically wise for the franchised cable operator -- either to obtain more subscribers or to drive out a competitor by obtaining enough subscribers on the particular property to destroy the competitor's economic base -- the franchised cable operator will exercise its eminent domain powers. If the condemnation is not economically wise, franchised cable operators are not obligated to, and will not, condemn at all. Taken as a whole, cable mandatory access statutes, whether intended to be or not, are protectionist rules aimed at securing a monopoly market position for franchised cable operators. Far from protecting consumers, these statutes aid franchised cable operators in the maximization of their own profit-making enterprises by increasing their subscriber bases at all costs and at the expense of their competitors. Tenants cannot possibly be the beneficiaries of these mandatory access laws if they have absolutely no rights or recourse available to rectify a cable franchisee's choice to reject condemnation. In like fashion, these laws do not prevent a cable franchisee from terminating service to a MDU if the operator decides it is in its best interests to pull up stakes and depart for greener pastures.

The discriminatory nature and effect of such mandatory access statutes is contrary to federal policy. As more fully explained in Section II.C.2. herein, Congress recognized that discriminatory mandatory access laws could not be justified.

In light of the foregoing, ICTA firmly believes that the Commission should preempt discriminatory mandatory access laws. Such laws have no place in the dynamic, competition-oriented telecommunications environment of the mid-1990's.

2. The Commission Has The Statutory Authority To Preempt Discriminatory State And Local Mandatory Access Laws

It is clear that the Commission has the power to preempt state and local mandatory access laws. Federal agencies, such as the Commission, possess independent preemption authority to act even in the absence of express congressional direction. As the United States Supreme Court has held repeatedly, a federal administrator may promulgate regulations designed to preempt state law. See, e.g., City of New York v. FCC, 486 U.S. 57 (1988). Moreover, "federal regulations have no less preemptive effect than federal statutes." De la Cuesta, 458 U.S. at 153.

Preemption of state or local laws by a federal agency, in the absence of congressional action expressly prohibiting preemption, is lawful so long as the agency has not exceeded its statutory authority or acted arbitrarily. Crisp, 467 U.S. at 699; De la Cuesta, 458 U.S. at 153-54. An agency's decision to preempt will not be deemed arbitrary if it represents a reasonable accommodation of conflicting policies that are within the agency's domain. See City of New York, 486 U.S. at 63-64; New York State Commission on Cable Television v. Federal Communications Commission, 749 F.2d 804, 807 (D.C. Cir. 1984). It is not necessary that the agency be directed by Congress to preempt; Congress need not have addressed preemption at all.

There is no question that the Commission's decision to preempt discriminatory state mandatory access laws is within the authority of the Commission. The Commission possesses broad authority to regulate the field of cable television. The Supreme Court found this to be so even before the enactment of the 1984 Cable Act. Crisp, 467 U.S. at 699-700. Therein, the Supreme Court held that the Commission could preempt an Oklahoma prohibition against the telecasting by cable operators of advertisements for alcoholic beverages by its signal carriage requirements. The Court reasoned that the Commission had "'broad responsibilities' to regulate all aspects of interstate communication by wire or radio . . .

and that this comprehensive authority included power to regulate cable communications systems . . . . [T]he Commission's authority extends to all regulatory actions 'necessary to ensure the achievement of the Commission's statutory responsibilities.'" Id. at 700 (citing U.S. v. Southwestern Cable Co., 392 U.S. 157 (1968); FCC v. Midwest Video Corp., 440 U.S. 689 (1979)).

Further proof that a decision to preempt is not outside of the Commission's broad authority arises from the fact that when Congress considered enacting a mandatory access provision, it exempted from any condemnation property owners who had already provided video programming services to tenants roughly equivalent to that offered by the franchised cable operator:

> This section shall not apply to any owner of a multiple unit residential or commercial building or manufactured home park who makes available to residents a diversity of information sources and services equivalent to those offered by the cable system authorized to provide cable service in the area in which such building is located, as determined under rules prescribed by the Commission.

Proposed Section 633(h)(1), H.R. Rep. No. 934 at 115.

It was well-recognized by Congress that a discriminatory mandatory access law could not be justified:

> The Committee believes that if a landlord or property owner provides residents of his premises with the ability to obtain a truly equivalent range of services, then the First Amendment goal of providing consumers access to as wide a diversity of information sources and services is not frustrated to the point that it requires a mandated right of access to cable services. After all, the Committee's goal is to ensure that the public has access to a wide diversity of information -- not to require that the information come from a particular source.[26/]

[26/] Therefore, it is clearly within the Commission's authority to preempt discriminatory state mandatory access laws, which action will not be contrary to congressional intent. See City of New York, 486 U.S. at 63-64; Crisp, 467 U.S. at 699 (courts will only disturb reasonable agency accommodation if it appears from the statute or legislative history that it is not one that Congress would have sanctioned).

H.R. Rep. at 81-82, 1984 U.S.C.C.A.N. at 4718 (emphasis added).[27]

Preemption would represent a reasonable accommodation of conflicting policies. In the 1992 Cable Act and the Telecommunications Act of 1996, Congress mandated that the Commission take numerous steps toward fostering the growth of competition in the cable industry. Given that state and municipal mandatory access statutes are anti-competitive, as shown in Section II.B herein, a decision to preempt such laws is a reasonable accommodation of conflicting policies.

Moreover, the enactment of the Telecommunications Act of 1996 unambiguously establishes the federal policy not to discriminate against any telecommunication providers, as, for example, the long-standing barriers to entry by telephone companies into cable are dismantled. Given that mandatory access laws continue to discriminate against non-franchised operators, preemption is a reasonable accommodation of conflicting policies for this reason as well.

III. ICTA STRONGLY RECOMMENDS THAT THE COMMISSION PRECLUDE CONTRACTS SPECIFYING A DURATION LINKED TO THE FRANCHISE AND ALL RENEWALS OR EXTENSIONS

To protect and promote competition in the market for the delivery of video programming services, ICTA strongly urges the Commission to prohibit service agreements between franchised cable operators and property owners that specify a duration linked to the length of the operator's franchise and any renewals or extensions, or that have similar such language. Agreements utilizing this language constitute "perpetual contracts" because their terms dictate that they will or may remain in effect forever. The

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[27] See Woolley, 867 F.2d at 156, n.3 (emphasis added) ("[E]ven those members of Congress who supported the draft of section 633 which would have provided mandatory access were motivated by a concern that tenants of multi-unit dwellings might not have access to cable in the absence of such a provision. In this case, however, there is no basis for any such concern because [the property owner's] tenants do have access to cable television, albeit service provided by a different system.").

potentially infinite duration of these contracts deters and often prevents alternative providers from ever competing to serve the property.

When a service agreement provides that it will continue for "the duration of the franchise and any renewals of the franchise," or words to that effect, it undoubtedly will extend in perpetuity given that it is exceedingly rare for a franchise not to be renewed. Property owners are often unaware that this language will result in a perpetual contract because they lack knowledge of the regularity with which franchises are renewed. Furthermore, the agreements are typically transferable to "successors and assigns." Accordingly, as the franchise is continually renewed and/or the rights of the franchised operator are continually transferred to a successor. the property owner is effectively locked into the agreement in perpetuity.

The practical result of this type of service agreement is that the owner's choice of provider is restricted forever. If the contract contains an exclusivity provision, the property owner simply cannot ever contract with an alternative provider without violating the agreement. Even if the agreement does not contain an exclusivity provision, it may simply not be economically feasible for another operator to provide service to the property in tandem with the franchised operator. In either situation, there may never be alternative providers even seeking to serve the property. These contracts cannot be justified based upon business necessities such as the need to recover costs. The terms of these perpetual contracts extend well beyond the period necessary for the cable operator to recoup its investment.

For these reasons, ICTA recommends that the Commission prohibit franchised cable operators from locking property owners into perpetual service agreements linked to the term of the operator's franchise and all renewals or extensions thereof. ICTA believes that the Commission should mandate

that all future service agreements between franchised operators and property owners include a durational provision that states that the agreement will remain in effect for a specific term of years. In this way, property owners will have clear notice of the effective duration of the agreement and not unknowingly restrict their choice of provider in perpetuity. This will also ensure that the market is invigorated at regular intervals by alternative providers attempting to win away properties served by incumbent franchised operators.

ICTA also believes that existing service agreements linked to the term of the franchise and any renewals or extensions should remain in effect only until the initial franchise term has expired, but in no event more than fifteen years from the effective date of the agreement. Once the initial franchise term or the maximum fifteen year period has expired, whichever is less, the agreement should be void. ICTA further recommends that for agreements that would already be void under this standard, the Commission should establish a six month period in which franchised operators may phase out their service or negotiate a new service agreement for a term of years if the property owner so desires.

IV. ICTA SUPPORTS APPLICATION OF THE SIGNAL LEAKAGE RULES TO NON-FRANCHISED CABLE SYSTEMS IN A TECHNOLOGY-SPECIFIC MANNER

In the Notice, the Commission has asked whether its cable signal leakage rules, which currently are applicable only to "cable systems," should apply to all providers of broadband services.[28/] As a factual matter, cable signal leakage has not been a significant problem for the systems of ICTA's members. On a cost-benefit basis, therefore, the suggested extension of the cable signal leakage rules would appear to create regulatory inefficiencies where none now exist. Nonetheless, as the lines between franchised cable operators and other broadband service providers become blurred, regulatory distinctions

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28/ Notice at ¶¶ 24-25.

based upon these lines become less coherent. ICTA concurs, therefore, with the Commission's tentative conclusion that the cable signal leakage standards should apply to all broadband service providers, whether or not they operate "cable systems" as the term is defined by the Communications Act and the Commission's rules.

ICTA strongly believes, however, that the Commission must tailor the signal leakage rules to the facilities and MDU operating conditions of private cable and not simply apply inappropriate technical standards developed for traditional franchised cable systems. Both the measurement techniques and the performance criteria presently set out in the rules are based on traditional cable trunk and feeder construction with substantial linear length of cable strand. In an MDU setting, it is virtually impossible to comply with § 76.609(h)(3) over 75% of the cable strand.

In order to qualify as private cable systems, rather than franchised cable systems, under the Commission's rules, private cable systems must use microwave links or stand-alone headends to avoid hardwired crossings of public rights-of-way. A single headend may serve many separate private cable systems in geographically distant parts of a metropolitan area. Thus, although a single headend may stand alone or serve several thousand subscribers via microwave links to multiple separate private cable systems, the individual systems are separated by long uncabled distances. These individual private cable systems pose relatively insignificant risks of signal leakage, since they use relatively modest lengths of cable strand from which leakage must be monitored.[29/]

[29/] Franchised cable operators are permitted to interconnect separate franchised systems with CARS band microwave under Part 78. These separate systems are not required to be deemed a single system for cable signal leakage purposes. The private cable application of 18 GHz microwave under Part 94 is directly analogous to the CARS band application. For example, the towns of Fritch, Stinette, Panhandle and White Deer, Texas, are supplied with signals via cars band microwave from a transmitter which is located in Borger, Texas, yet each of these is treated as a (continued...)

Therefore, ICTA recommends that once the Commission develops measurement techniques more appropriate for private cable operators serving MDUs, the private cable signal leakage performance criteria should be applied to a sampling of at least 75 % of the cable strand for each separate system, (i.e., the following are each separate systems: the cabled system directly connected with coaxial wire to the headend associated with a microwave transmitter or repeater locations; the cabled system directly connected with coaxial wire to an individual microwave receiver site; and the cabled system directly connected with coaxial wire to a stand-alone headend.).[30/] Such a rule would be entirely consistent with the Commission's prior practices and policies.

ICTA also recommends that a five year transition period be established during which private cable operators would be allowed to bring all existing systems into full compliance with signal leakage rules. Having not applied these rules to private cable operators for nearly fifteen years, it seems only equitable, given the associated costs, to afford operators a reasonable time period within which to upgrade their existing systems.

V. ICTA BELIEVES THAT THE COMMISSION SHOULD REAFFIRM ITS RULE THAT THE TELEPHONE DEMARCATION POINT SHOULD BE AT THE MINIMUM POINT OF ENTRY IN MDUs

In the Notice, the Commission seeks comment on the "effect of changing the telephone network demarcation point to mirror the cable demarcation point (i.e., at or about 12 inches outside of the point at which the cable wire enters the subscriber's premises.)."[31/] Because such a change would

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[29/](...continued)
separate system under the rules. Cable strand in separate private cable systems interconnected via 18 GHz microwave should not, therefore, be aggregated.

[30/] See C.F.R. §76.611.

[31/] Notice at ¶ 16.

further inhibit the growth of competition in telecommunications services provided to MDUs, ICTA opposes such a change.

The current telephone demarcation point rules mandate LECs to establish a "reasonable and nondiscriminatory" standard procedure of placing the demarcation point at the minimum point of entry,[32] balancing the interests of consumers and carriers while protecting the public network. However, these rules are in practice largely ignored by LECs seeking to inhibit competitive access to MDUs. Therefore, ICTA urges the Commission to clarify telephone demarcation point rules to ensure that the telephone demarcation point actually is made the minimum point of entry into MDUs for all properties.

When the Commission revised its definition of the telephone demarcation point in 1990, it sought to establish a demarcation point for MDUs that was "sufficiently flexible to accommodate" existing wiring configurations while encouraging carriers to fix a demarcation point that would advance the Commission's procompetitive goals.[33] Thus, the Commission allowed the demarcation point for existing MDUs to be set in accordance with a carrier's reasonable and nondiscriminatory standard practice.[34] For new MDUs, including those in which existing wire has been modified since August 13, 1990, the Commission provided that carriers could establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry into the MDU (either where

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[32] See Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd 4686 (1990).

[33] Id. at 4693.

[34] Id.

the wire entered the building or where the wire crosses the property line).[35/] Where LECs do not establish such a practice, property owners are entitled to determine the location of the demarcation point.[36/]

Despite the clear intent of the rule for properties built prior to 1990, certain LECs have never developed a policy and when they did so upon a provider's request, they designated the demarcation point at the first jack in each apartment, usually the one in the kitchen which is further into the apartment than the maximum 12 inch limit.[37/] Thus, LECs have effectively denied competitors access to inside wiring in contravention of the procompetitive intent of the rules for multifamily installations. Today, without any basis in law, many incumbent LECs continue to maintain as a blanket policy that the telephone demarcation point in the MDUs they serve is at the first jack in each individual unit.

LEC resistance in placing the telephone demarcation point at a reasonable and nondiscriminatory place in pre-1990 MDUs is nothing more than anticompetitive behavior hiding behind a claimed vagueness in the rules. LEC resistance has made it very difficult for alternative providers to compete for telephone service in pre-1990 buildings for many of the same reasons that the current cable demarcation point discourages competition in video programming distribution. LECs allowed to take this course of action have shut out STS competition from their states much like mandatory access has done for cable. STS providers will go elsewhere.

35/ Id. The Commission noted in its decision that the "revised definition of the demarcation point for [MDUs] permits, but does not require, that the demarcation point be at the minimum point of entry. The Commission may later explore whether the public interest requires that the demarcation point in [MDUs], both new and existing, be at the minimum point of entry." Id. at n.30.

36/ Id.

37/ For many properties constructed prior to 1990, the wiring has been modified, rearranged or added to after 1990 so that the post-1990 rule applies in any event. Therefore, the construction date is not always determinative of which rule applies, notwithstanding LECs' claims and practices to the contrary.

Post-1990 buildings have also been the subject of anticompetitive conduct. ICTA, therefore, urges the Commission to clarify its telephone demarcation point for all buildings, not by making it closer to the current cable demarcation point, but by stating explicitly that LECs are required to place the telephone demarcation point in MDUs, both new and existing, at the minimum point of entry, unless otherwise designated by the property owner.

In addition, because property owners have, in most cases, invested substantial sums of money in providing for communications access consistent with the structural and aesthetic characteristics of their buildings, and because of tenant security, service provider convenience, and property owner liability for persons on their property, property owners should retain the discretion to determine the location of such a minimum point of entry.

By modifying its rules as suggested above, the Commission would greatly enhance the growth and development of competition at the local exchange level in MDUs. Given the pervasive problems regarding access to LEC wiring, many would-be competitors have been discouraged from entering the market, since it simply is too burdensome on a new entrant to rewire entire MDUs in order to provide service. Moreover, MDU owners resist changing providers when the new service provider will be required to break into interior walls and conduits in order to reach individual units within the building. New entrants that seek to challenge obstructionist LECs are compelled to litigate, on a state by state basis, for access to the telephone inside wiring.[38/] This process is, of course, exceedingly slow and expensive and it has a significant chilling effect on competition.

[38/] To further increase competitive access to MDUs, the Commission should provide an express complaint procedure, at the federal level, for telephone inside wiring complaints. This would obviate the filing and prosecution of numerous individual cases in each state in which a competitive provider seeks to provide service.

If the incumbent LEC wiring demarcation point, for all MDUs regardless of when constructed, were limited to the least invasive point on the property (the minimum point of entry as defined or otherwise designated by the MDU owner that is technically and economically feasible for introducing competition), alternative providers could compete for service contracts with the expectation of having practical access to the individual units in each MDU. In addition, property owners would have greater bargaining power vis-a-vis service providers if they could guarantee such access, which could be used to obtain lower cost, customized services for the residents of the MDU. Thus, by firmly establishing the telephone demarcation point in MDUs at the minimum point of entry, the Commission would foster all of the familiar benefits of competition.

CONCLUSION

In light of the foregoing, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments herein.

Respectfully submitted,

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